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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)

Implementation of Cable Act Reform Provisions)
 of the Telecommunications Act of 1996)

CS Docket No. 96-85

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby submits its consolidated reply to the Oppositions filed by the National Cable Television Association ("NCTA") and Time Warner Cable ("Time Warner") against the WCA's Petition for Reconsideration in the above-captioned proceeding.

WCA has requested reconsideration of that portion of the Commission's *Report and Order* in which the Commission mistakenly interprets the term "bulk discount" in Section 301(b)(2) of the Telecommunications Act of 1996 (the "1996 Act")^{1/} so as to allow cable operators to charge non-uniform rates to residents of multiple dwelling units ("MDUs") who do not receive bulk service, but instead individually subscribe to service and are billed directly by the cable operator.^{2/} Under Section 623(d) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), cable operators generally are required to maintain geographically uniform rates in areas where they

^{1/} 1996 Act, § 301(b)(2), 100 Stat. 115.

^{2/} See Petition for Reconsideration filed by The Wireless Communications Association International, Inc., CS Docket No. 96-85 (filed Aug. 2, 1999) (the "WCA Petition").

are not subject to effective competition.^{3/} When Congress passed the 1996 Act, it codified, with some minor modifications, the Commission's then-existing bulk discount exception to Section 623(d). In so doing, Congress specifically applied the exception to "bulk" discounts, not, as implied in the *R&O*, "volume" discounts.^{4/}

It is well settled that unless Congress indicates otherwise, statutory exceptions must be read narrowly in order to preserve the primary operation of the governing provision.^{5/} It therefore is critical to note that in codifying the Commission's "bulk discount" exception to the statutory uniform pricing requirement, Congress stated no intent to eliminate the fundamental distinction between a bulk discount (*i.e.*, a reduced rate offered on a bulk contract basis directly to owners and managers of MDU properties) and what the Commission now calls a "volume" discount (*i.e.*, a reduced per-unit rate offered and billed directly to individual MDU residents).^{6/} Nor is there anything in the statute which suggests that Congress has given the Commission any authority to extend the "bulk discount" exception to situations other than those where the owner or manager of an MDU subscribes and pays for all residents in a single transaction.^{7/}

Simply put, the Commission has ignored the words chosen by Congress, declared that "bulk" means "volume," and expanded the bulk discount exception in Section 301(b)(2) so that it applies

^{3/} 47 U.S.C. § 543(d).

^{4/} See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, FCC 99-57, at ¶ 100 (rel. March 29, 1999) (the "*R&O*").

^{5/} *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); see also, *e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

^{6/} WCA Petition at 6-7.

^{7/} *Id.*

even where an incumbent cable operator markets its services directly to MDU residents on a unit-by-unit basis and bills them separately.^{8/} Moreover, the Commission has compounded the problem by declaring that the term “multiple dwelling unit” is not limited to a single building that houses multiple residences, but in fact is broad enough to include quasi-single family environments such as trailer parks and, by logical extension, detached single family homes on private property that can be served without crossing a public right-of-way.^{9/}

Nonetheless, NCTA and Time Warner maintain that the Commission’s expanded definition of “bulk discount” is permitted under Section 301(b)(2), on the theory that since neither Congress nor the Commission has ever adopted a formal definition of the term, the Commission is now free to define the term “bulk discount” to include non-bulk discounts so long as it asserts a proper rationale for doing so.^{10/} For the reasons discussed below, this argument is without merit and should be rejected.

While it is true that neither the 1996 Act nor the Commission’s Rules include a formal definition of “bulk discount,” it is clear from the 1996 *Notice of Proposed Rulemaking* in this proceeding that the Commission had understood the term to refer to discounts offered on a true bulk basis, *i.e.*, where the MDU owner or manager receives and is billed for a single, discounted rate in exchange for guaranteeing an incumbent cable operator 100% subscriber penetration within the

^{8/} *R&O* at ¶ 100.

^{9/} *Id.* at ¶ 105.

^{10/} See Opposition of The National Cable Television Association, CS Docket No. 96-85, at 11-15 (filed Sept. 2, 1999) (the “NCTA Opposition”); Opposition of Time Warner Cable to Petitions For Reconsideration, CS Docket No. 96-85, at 13-20 (filed Sept. 2, 1999) (the “Time Warner Opposition”).

MDU owner's property.^{11/} Significantly, neither NCTA nor Time Warner cite to anything which suggests that prior to adoption of the 1996 Act the Commission had ever understood the term "bulk discount" to mean anything else. Likewise, neither NCTA nor Time Warner cite to anything in Section 301(b)(2) or its legislative history which suggests that Congress understood the term to mean anything else. When viewed in this context, it is evident from the *R&O* that the Commission understood the meaning of "bulk discount" but changed its position as a post-1996 Act attempt to accommodate the cable industry, and not because the Commission or Congress has ever believed that a "bulk discount" is one that is offered and billed separately to individual MDU residents on a per-unit basis.^{12/}

Indeed, any doubts as to the Commission's understanding of the term "bulk discount" are put to rest by the Commission's current methodology for calculating a cable system's annual regulatory fees:

Cable system operators are to compute their subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber

^{11/} See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5970-71 (1996) ("We tentatively conclude that the bulk rate exception does not permit a cable operator to offer discounted rates on an individual basis to subscribers simply because they are residents of a multiple dwelling unit, but rather requires a 'bulk discount[],' to use the language of the statute, that is negotiated by the property owner or manager on behalf of all of the tenants.").

^{12/} Time Warner asserts that in codifying the Commission's then-existing bulk discount exception, Congress did not intend to codify any prior usages of the term "bulk discount." Time Warner Opposition at 16. It is difficult to square this argument with the fact that Congress *added* the term "bulk discount" to the exception, and otherwise rejected only that portion of the underlying Commission rule (Section 76.984(b)) that required incumbent cable operators to maintain uniform bulk discounts among buildings of the same size and type. Compare 1996 Act, § 301(b)(2) with 47 C.F.R. § 76.984(b) (1995).

rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers
= Total annual bulk-rate charge divided by basic annual subscription rate for
individual households.^{13/}

The implication of the above is patent: a cable system's total number of "bulk rate" subscribers in an MDU are determined by reference to a single "bulk-rate charge" paid by the property owner or manager, not to any charges paid individually by tenants on a per-unit basis. In other words, property owners or managers pay "bulk" rates, and tenants who purchase service separately on a per-unit basis pay "basic subscriber rates." There is no such thing as an "individual household in [a] multiple dwelling unit . . . paying at the *bulk* rate." If the Commission believed otherwise, it presumably would have included that category of subscribers in its formula for calculating a cable operator's annual regulatory fees.^{14/}

^{13/} WCA Petition at 7-8, *quoting Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, FCC 99-146, at n.48 (rel. June 18, 1999).

^{14/} Time Warner argues that the Commission's formula for calculating cable annual regulatory fees has no bearing on the meaning of "bulk discount," since "[t]he billing of individual units in an MDU pursuant to a bulk discount still involves a total bulk-rate charge for the entire MDU." Time Warner Opposition at 20. The following example demonstrates why Time Warner's argument makes absolutely no sense. Assume that a cable operator's standard basic subscriber rate is \$25 per subscriber per month, but that its "bulk rate" for an MDU with 100 units is \$2000 or \$20 per subscriber per month. Also assume that the cable operator offers and bills service to each tenant separately on a per-unit basis, without receiving a single bulk-rate payment from the landlord. If each unit in the MDU is counted as an "individual household . . . paying at the basic subscriber rate," the building would have 100 subscribers under the Commission's formula for calculating the cable operator's regulatory fees. Under Time Warner's theory, however, the cable operator would still enjoy the benefit of "bulk rate" treatment under the formula, meaning that the cable operator could report that it has only 80 subscribers in the building (*i.e.*, \$2000 divided by \$25 = 80 subscribers). In effect, Time Warner's tortured concept of a "bulk discount" would enable the cable operator to obtain a 20% discount off its annual regulatory fee (*i.e.*, the difference between 100 subscribers and 80 subscribers) simply by billing MDU tenants separately rather via a single "bulk" invoice to the landlord. Presumably, the Commission did not intend to allow cable operators to "end run" their annual regulatory fees in this manner. The above example thus highlights the fallacy of categorizing a discount offered and billed separately to individual MDU residents as a "bulk discount" where no

Perhaps recognizing the illogic of their respective attempts to reconcile the statutory term “bulk discount” with what the Commission calls a “volume discount,” NCTA and Time Warner contend that Congressional intent will be best effectuated by eliminating any distinction whatsoever between bulk and non-bulk discounts, and that the Commission therefore properly defined a “bulk discount” to include all discounted rates for service to MDU subscribers, regardless of how they are negotiated, offered or billed.^{15/} Certainly, where an incumbent cable operator negotiates a single bulk rate with a landlord in exchange for a guarantee of 100% penetration, but bills each tenant separately at the landlord’s request, the incumbent cable operator should be entitled to the benefits of the statutory bulk discount exception, since the underlying sale of service is a true “bulk” sale. However, defining “bulk discount” to encompass every possible type of discount offered to tenants in an MDU effectively reads the term “bulk” out of Section 301(b)(2), and thus violates the well-established judicial principle that when interpreting federal statutes, effect must be given to every word where possible.^{16/} Absent further direction from Congress, the Commission simply has no authority to nullify Congress’s use of the term “bulk” in Section 301(b)(2).^{17/}

“bulk sale” is involved.

^{15/} See NCTA Opposition at 15; Time Warner Opposition at 17-18.

^{16/} See, e.g., *United States v. Bernier*, 954 F.2d 818, 819-20 (2d Cir. 1992), *cert. denied*, 508 U.S. 941, 113 S.Ct. 2417, 124 L.Ed.2d 640 (1993).

^{17/} NCTA alleges that WCA’s members “would, of course, like to limit the ability of cable operators to respond, even in a non-predatory manner, to MDU competition,” apparently to suggest that WCA’s objection to the Commission’s interpretation of “bulk discount” is anticompetitive. NCTA Opposition at 12. To say the least, NCTA’s allegation is ironic given the Commission’s previous findings as to the state of competition in the MDU environment. See, e.g., *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659, 3679-80 (1997) (“The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes

Moreover, at no point in their respective Oppositions do NCTA or Time Warner contest the fact that the Commission has actually *contravened* Congressional intent by adopting an extremely expansive definition of “multiple dwelling unit” in tandem with its extension of the “bulk discount” exception to non-bulk situations. Specifically, since the Commission’s expanded definition of “multiple dwelling unit” includes quasi-single family environments such as trailer parks, the definition presumably would also include any townhouse development or other planned community of single-family units that can be served without crossing a public right-of-way.^{18/} In fact, taking the Commission’s reasoning to its logical extreme, incumbent cable operators can avoid the statutory uniform pricing requirement for single family dwellings by offering what the Commission calls “volume” discounts to a city block of single-family homes, so long as they can be served without crossing a public right-of-way.^{19/} This obviously would eviscerate the statutory uniform pricing requirement in many single- family environments, and thus would extend the statutory bulk discount exception well beyond what Congress had intended.^{20/}

Finally, the results-oriented nature of NCTA/Time Warner’s analysis of the “bulk discount” exception is brought into even sharper focus by NCTA’s position on whether Section 301(b)(2)’s

its alleged ownership interest in the home run wiring. . . . [I]ncumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result, regardless of the cable operator’s motives, is to chill the competitive environment.”) (footnotes omitted).

^{18/} WCA Petition at 9.

^{19/} *Id.* at 9-10.

^{20/} *Id.* at 10.

prohibition against predatory pricing in MDUs should apply to all cable operators, regardless of whether they are subject to effective competition.^{21/} In arguing that the prohibition should not apply to cable systems facing effective competition, NCTA argues that Section 301(b)(2) explicitly applies the predatory pricing restriction only to cable systems not subject to effective competition, and that the Commission cannot stray beyond the “plain language” of the statute.^{22/} Yet that is precisely what NCTA is asking the Commission to do when interpreting the term “bulk discount” as used in Section 301(b)(2). In other words, if, as NCTA alleges, Congress’s application of the predatory pricing restriction in Section 301(b)(2) to non-competitive cable systems prevents the Commission from applying the restriction to systems subject to effective competition, then by logical extension Congress’s use of the term “bulk discount” in Section 301(b)(2) similarly prevents the Commission from applying the bulk discount exception to non-bulk situations. That NCTA would attempt to argue otherwise showcases the meritless nature of its Opposition, and thus militates even further in favor of reconsideration of the *R&O* as requested in WCA’s Petition.^{23/}

^{21/} The associated Commission rule, Section 76.984(c)(3), states that the statutory bulk discount exception does not apply to “[b]ulk discounts to multiple dwelling units . . . , except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.” 47 C.F.R. § 76.984(c)(3).

^{22/} NCTA Opposition at 17.

^{23/} Unlike the case with respect to the Commission’s redefinition of “bulk discount,” there is substantial evidence in the legislative history of Section 301(b)(2) which confirms that Congress did not intend to allow cable systems to engage in predatory pricing merely because they are subject to effective competition. *See* WCA Petition at 10-11, *quoting* Remarks of Sen. Slade Gorton, 142 Cong. Rec. 5720 (daily ed. Feb. 1, 1996). Furthermore, contrary to what is suggested in NCTA’s Opposition, at no point did Congress state any intent that the Commission “share” jurisdiction over predatory pricing by leaving those cases involving non-competitive cable systems to the exclusive domain of the Department of Justice. NCTA Opposition at 17-18. Indeed, the Cable Services Bureau has emphatically rejected such notions of “shared” jurisdiction elsewhere, recognizing that

In sum, the *R&O* leaves cable's competitors with the disturbing impression that, at least where issues of critical importance to alternative MVPDs are concerned, the Commission's approach to statutory interpretation is becoming a moving target. In the program access context, the Cable Services Bureau has repeatedly and emphatically stated that the Commission cannot go beyond the words used by Congress in Section 628 of the 1992 Cable Act, and that the Commission therefore has virtually no authority to extend the program access law to programming that is migrated from satellite to terrestrial delivery.^{24/} Here, to placate the demands of the cable industry, the Commission has taken the opposite tack, read the statutory bulk discount exception to the uniform pricing rule broadly and extended the exception to non-bulk situations, notwithstanding the fact that Section 301(b)(2) refers *only* to "bulk" discounts.^{25/} WCA respectfully submits that the Commission cannot have it both ways: if, as in the case of program access, the Commission truly believes that its statutory authority is limited by the precise words used by Congress, then it should instruct the cable industry to do what it has been telling cable's competitors to do for some time with respect to Section 628, *i.e.*, ask Congress to amend Section 301(b)(2) to extend the statutory bulk discount exception to non-bulk discounts in MDUs. Short of that, the Commission cannot sensibly assert any

"[t]he Commission's mandate to consider competitive issues as part of the public interest standard under the Communications Act is a separate and distinct obligation from the Department of Justice's responsibility to enforce the antitrust laws." *Tele-communications, Inc. and Liberty Media Corporation*, 9 FCC Rcd 4783, 4785 (CSB 1994).

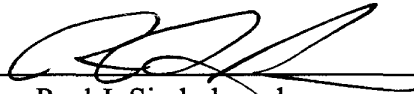
^{24/} See WCA Petition at 4 n.8, citing *EchoStar Communications Corporation v. Comcast Corporation et al.*, 14 FCC Rcd 2089, 2099 (CSB, 1999) and *DirecTV, Inc. v. Comcast SportsNet, et al.*, 13 FCC Rcd 21822, 21834-5 (CSB, 1998).

^{25/} It is telling that nowhere in their respective Oppositions do NCTA or Time Warner attempt to reconcile the Commission's liberal interpretation of Section 301(b)(2) with the Commission's far more restrictive interpretation of Section 628.

authority to do what it has done in this proceeding, and should therefore reconsider the *R&O* as requested in WCA's Petition.

Respectfully submitted,

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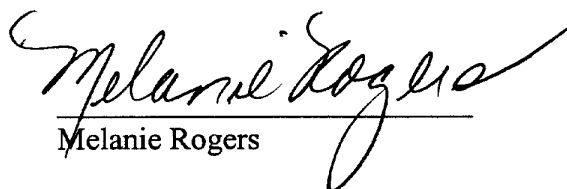
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CERTIFICATE OF SERVICE

I, Melanie Rogers, hereby certify that a true copy of the foregoing Reply Comments was served this 15th day of September, 1999, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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